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Child A (a minor suing through Mohamad Radzhi bin Hasan as adopted father and litigation representative) & Ors v Fazilah bt Abdul Aziz

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HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12B-51-09 OF
2019
KENNETH ST JAMES JC

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25 MAY 2023

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Civil Procedure — Appeal — Notice of appeal — Second and third appellants as third parties joined in on first appellant's appeal as co-appellants — Respondent objected that notice of appeal was defective — Whether second and third appellants should have filed separate appeals

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Tort — Road accident — Liability and quantum — Sessions court judge held first appellant 25% liable, second appellant 25% liable and third appellant 50% liable — Sessions court awarded damages — Appeal against decision — Whether trial judge was 'plainly wrong' in decision on liability and quantum

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There was a motor vehicle accident involving three children on a motorcycle. The rider was a 12-year-old girl and the pillion riders with her on the motorcycle were also minors. At a junction with traffic lights, while making a U-turn, they collided with a car. The first appellant ('the plaintiff') was one of the pillion riders that filed a sessions court suit against respondent ('the defendant') ie the car driver. The defendant brought a third-party suit against the second appellant ie plaintiff's father ('TP1') and the third appellant ie father of the rider ('TP2'). The sessions court dismissed the plaintiff's suit, having found the defendant not liable for the accident. The plaintiff appealed to the High Court. The two third parties, TP1 and TP2, joined in on the plaintiff's appeal, where the three of them filed one notice of appeal, as co-appellants. The defendant objected that the notice of appeal was defective, submitting that as third parties, TP1 and TP2 could not file their appeals to the High Court using the same notice of appeal as the plaintiff; that they must file separate notices of appeal.

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Held, dismissing the appeal:

- (1) The foundation and structure of the judgment in the suit between the plaintiff and the defendant was the original dispute between the plaintiff and the defendant, ie the plaintiff's suit for negligence against the defendant; whereas the foundation and structure of the judgment in the

suit between the defendant and TP1 and TP2 was the third party suit between the defendant and TP1 and TP2, ie on the issue of indemnity or contribution by TP1 and TP2 towards the liability of the defendant. Hence, TP1 and TP2 could appeal against the judgment in the suit between the defendant and TP1 and TP2, but not against the judgment in the suit between the plaintiff and the defendant. It was not proper for TP1 and TP2 to join up with the plaintiff to lodge one combined appeal. Their respective causes and suits were separate from each other. Since the sessions court found no liability on the part of the defendant, there was no judgment for TP1 and TP2 to appeal against. Hence, TP1 and TP2's purported appeals, which were conflated with the sole notice of appeal lodged, were defective and incompetent (see paras 26–27 & 29–30).

- (2) The sessions court judge ('SCJ') correctly applied the principle of law that in this negligence suit, the burden was on the plaintiff to prove that the defendant was negligent. The SCJ also correctly applied the principle that where there were conflicting versions of the facts of a case ie in this case how the accident happened, the trial judge's approach was to consider which of the two conflicting versions was inherently probable. The SCJ found the defendant's version to be 'inherently probable' and consequently, the plaintiff had failed to prove, on the balance of probabilities, that the defendant was negligent. Even though SCJ's apportionment of liability was not in line with the principle that the third-party proceeding was a separate suit between the defendant and TP1 and TP2, the SCJ's reasoning did not necessarily make the SCJ 'plainly wrong', or that the SCJ committed a fundamental error in her judgment in the plaintiff's suit against the defendant. The effect of the SCJ's finding that the plaintiff was 25% 'liable', that TP1 was 25% liable, and that TP2 was 50% liable for the plaintiff's injuries — was that the defendant was not at all liable to the plaintiff, in the plaintiff's suit against the defendant. The SCJ's apportionment of liability did not make the SCJ 'plainly wrong' in her judgment. The SCJ's appreciation of the evidence and the surrounding factors was fair and balanced (see paras 61, 64, 83, 105, 107, 111 & 113).
- (3) The SCJ's judgment on quantum was reasonable. There was nothing fundamentally flawed or erroneous in the method and in her findings. The SCJ was not 'plainly wrong' for: (a) accepting the defendant's proposal and submissions for each heading of injury; and (b) deducting 20% from the sum of general damages for overlapping as the plaintiff's injuries were in fact concentrated at the head. For special damages, out of 16 items of special damages and costs, the only item of special damages that was recorded by the SCJ as 'Agreed' was the sum of RM82.30, not RM619.80 as alleged by the plaintiff. In addition, the plaintiff did not show the court that the parties had agreed to the sum of RM619.80 and

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- A informed the SCJ to record this allegedly agreed sum of special damages (see paras 117, 124, 127 & 131–132).

[Bahasa Malaysia summary]

- B Terdapat satu kemalangan kenderaan bermotor yang melibatkan tiga kanak-kanak menaiki motosikal. Penunggang adalah seorang kanak-kanak perempuan berusia 12 tahun dan pembonceng bersamanya di atas motosikal itu juga di bawah umur. Di persimpangan lampu isyarat, semasa membuat pusingan U, mereka bertembung dengan sebuah kereta. Perayu pertama (‘plaintif’) merupakan salah seorang pembonceng yang memfailkan saman mahkamah sesyen terhadap responden (‘defendan’) iaitu pemandu kereta. C Defendan telah membawa saman pihak ketiga terhadap perayu kedua iaitu bapa plaintif (‘TP1’) dan perayu ketiga iaitu bapa penunggang (‘TP2’). Mahkamah sesyen menolak saman plaintif, setelah mendapati defendan tidak bertanggungjawab atas kemalangan itu. D Plaintif merayu ke Mahkamah Tinggi. Kedua-dua pihak ketiga, TP1 dan TP2, menyertai rayuan plaintif, di mana ketiga-tiga mereka memfailkan satu notis rayuan, sebagai perayu bersama. Defendan membantah bahawa notis rayuan adalah cacat, dengan menghujahkan bahawa sebagai pihak ketiga, TP1 dan TP2 tidak boleh memfailkan rayuan mereka ke Mahkamah Tinggi menggunakan notis rayuan yang sama seperti plaintif; bahawa mereka mesti memfailkan notis rayuan yang berasingan. E

Diputuskan, menolak rayuan:

- F (1) Asas dan struktur penghakiman dalam saman antara plaintif dan defendan adalah pertikaian asal antara plaintif dan defendan, iaitu saman plaintif kerana kecuaiian terhadap defendan; sedangkan asas dan struktur penghakiman dalam saman antara defendan dengan TP1 dan TP2 adalah saman pihak ketiga antara defendan dengan TP1 dan TP2, iaitu mengenai isu indemniti atau sumbangan oleh TP1 dan TP2 terhadap G liabiliti defendan. Oleh itu, TP1 dan TP2 boleh merayu terhadap penghakiman dalam saman antara defendan dan TP1 dan TP2, tetapi tidak terhadap penghakiman dalam saman antara plaintif dan defendan. Adalah tidak wajar untuk TP1 dan TP2 bergabung dengan plaintif untuk H mengemukakan satu rayuan gabungan. Kausa dan saman masing-masing adalah berasingan antara satu sama lain. Memandangkan mahkamah sesyen mendapati tiada liabiliti di pihak defendan, tiada penghakiman untuk TP1 dan TP2 untuk merayu. Oleh itu, rayuan TP1 dan TP2 yang dikatakan, yang digabungkan dengan satu-satunya notis rayuan yang I dikemukakan, adalah cacat dan tidak kompeten (lihat perenggan 26–27 & 29–30).
- (2) Hakim mahkamah sesyen (‘HMS’) menggunakan prinsip undang-undang dengan betul bahawa dalam saman kecuaiian ini, beban terletak pada plaintif untuk membuktikan bahawa defendan cuai. HMS

juga menggunakan prinsip dengan betul bahawa jika terdapat versi bercanggah fakta kes iaitu dalam kes ini bagaimana kemalangan itu berlaku, pendekatan hakim bicara adalah untuk mempertimbangkan yang mana antara dua versi yang bercanggah itu sememangnya berkemungkinan. HMS mendapati versi defendan adalah 'lebih berkemungkinan' dan akibatnya, plaintif telah gagal membuktikan, berdasarkan imbalan kebarangkalian, bahawa defendan cuai. Walaupun pembahagian liabiliti HMS tidak selaras dengan prinsip bahawa prosiding pihak ketiga adalah saman berasingan antara defendan dan TP1 dan TP2, alasan HMS tidak semestinya menjadikan HMS 'jelas salah', atau HMS melakukan kesilapan asas dalam penghakimannya dalam saman plaintif terhadap defendan. Kesan daripada penemuan HMS bahawa plaintif adalah 25% 'bertanggungjawab', bahawa TP1 adalah 25% bertanggungjawab, dan bahawa TP2 adalah 50% bertanggungjawab untuk kecederaan plaintif — adalah bahawa defendan tidak bertanggungjawab sama sekali kepada plaintif, dalam saman plaintif terhadap defendan. Pembahagian liabiliti HMS tidak menjadikan HMS 'jelas salah' dalam penghakimannya. Penghargaan HMS terhadap keterangan dan faktor sekeliling adalah adil dan seimbang (lihat perenggan 61, 64, 83, 105, 107, 111 & 113).

- (3) Penghakiman HMS mengenai kuantum adalah munasabah. Tiada apa-apa yang pada asasnya cacat atau salah dalam kaedah dan dalam penemuannya. HMS tidak 'jelas salah' kerana: (a) menerima cadangan dan hujahan defendan untuk setiap tajuk kecederaan; dan (b) menolak 20% daripada jumlah ganti rugi am untuk pertindihan kerana kecederaan plaintif sebenarnya tertumpu di bahagian kepala. Bagi ganti rugi khas, daripada 16 perkara ganti rugi khas dan kos, satu-satunya perkara ganti rugi khas yang direkodkan oleh HMS sebagai 'Dipersetujui' ialah jumlah RM82.30, bukan RM619.80 seperti yang didakwa oleh plaintif. Di samping itu, plaintif tidak menunjukkan kepada mahkamah bahawa pihak-pihak telah bersetuju dengan jumlah RM619.80 dan memaklumkan HMS untuk merekodkan jumlah ganti rugi khas yang didakwa dipersetujui ini (lihat perenggan 117, 124, 127 & 131–132).]

Cases referred to

- Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600, SC (refd)
Karthiayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119; [1974] 1 LNS 61, FC (refd)
Lilies Suraya Abdul Latib v Khairul Sabri [2020] 4 AMR 365; [2019] 1 LNS 2099, HC (folld)
Majlis Bandaraya Petaling Jaya v Digital Viva Sdn Bhd & Anor [2020] MLJU 88; [2020] 3 CLJ 520, CA (folld)

- A** *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 ; [1989] 1 CLJ 98, SC (folld)
Ng Chul Sia v Maimon bt Ali [1983] 1 MLJ 110; [1982] 1 LNS 95, HC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 8 AMR 227;
- B** [2020] 10 CLJ 1, FC (refd)
Noorianti Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242; [1990] 1 CLJ 943, HC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641, FC (refd)
- C** *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785, FC (refd)
- D** *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 AMR 1561; [1999] 2 CLJ 151, FC (folld)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175; [1971] 1 LNS 151, FC (refd)
- E** **Legislation referred to**
Road Traffic Rules 1959 r 13(1)
Rules of Court 2012 O 16 rr 3, 3(3), 7
Shuroma Guha Thakurta (Manjit & Co) for the appellant.
- F** *Sean Teh Weng Kim (Sim & Sean) for the second and third appellant.*
Jannu Babjan (PR Manecksha & Assoc) for the respondent.

Kenneth St James JC:

G PRELUSION

H [1] There was a motor vehicle accident. Three children were out on the road on a motorcycle, at about 9.30pm, on a weeknight. The rider was a girl of 12-years-old. The two pillion riders with her on the motorcycle were also minors.

I [2] At a junction with traffic lights, they made a U-turn. When they made that U-turn, they collided with a car.

[3] One of the pillion riders filed a sessions court suit, against the car driver. The driver brought a third party suit against the father of the pillion rider who filed the suit, and against the father of the rider.

[4] The sessions court dismissed the pillion rider's suit. The sessions court found the driver not liable for the accident. A

[5] The pillion rider appealed to the High Court. The two third parties ('the fathers') joined in on the pillion rider's appeal. In other words, the three of them filed *one* notice of appeal, as co-appellants. B

[6] In the High Court appeal proceedings, the driver objected to the fathers' appeals, submitting that as third parties, the fathers have to file separate appeals; that they cannot join in on the pillion rider's appeal. I allowed the objection and found that the fathers' appeals were defective. C

[7] As for the pillion rider's appeal proper, I dismissed her appeal.

[8] The pillion rider applied for leave to appeal to the Court of Appeal. The two third-party-fathers also applied for leave to appeal to the Court of Appeal. This time, the two fathers filed a separate application for leave to appeal. The Court of Appeal granted the pillion rider and the two fathers leave to appeal. D

[9] This judgment is written for the purpose of both appeals to the Court of Appeal. This judgment contains my reasons for allowing the driver's objections against the fathers' appeals from the sessions court (for conflating their appeals with the pillion rider's appeal). This judgment also contains my reasons for dismissing the pillion rider's appeal from the sessions court. E
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THE PARTIES

[10] The pillion rider was the first appellant in the appeal before me. At the time of the accident, she was a minor. She was the plaintiff in the sessions court ('P'). The second appellant is her father. He was the first third party in the sessions court ('TP1'). The third appellant is the motorcycle rider's father. He was the second third party in the sessions court ('TP2'). The respondent was the car driver. She was the defendant in the sessions court ('D'). G
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[11] For ease of comprehension, I propose to refer to the parties as they appeared in the sessions court. The plaintiff ('the pillion rider') is 'P'. The first third party (P's father) is 'TP1'. The second third party (the motorcycle rider's father) is 'TP2'. The defendant (the car driver) is 'D'. I

[12] I will also refer to TP1 and TP2 together as 'TP1TP2'.

A THE PRELIMINARY OBJECTION AGAINST TP1TP2'S APPEALS

B [13] D raised a preliminary objection against the conflated notice of appeal. The notice of appeal was filed by P, TP1 and TP2. The three of them filed a single notice of appeal. D objected that the notice of appeal was defective, particularly TP1TP2's appeals. D submitted that TP1TP2 could not file their appeals to the High Court using the same notice of appeal as P; that they must file *separate* notices of appeal.

C [14] TP1TP2's reply to the objection was that:

(a) D had no objections to P's solicitors acting also for TP1TP2 in the sessions court suit; and

(b) D suffered no prejudice by the combined appeals of P and TP1TP2.

D [15] I found that these two replies missed the point of the objection. So, to determine D's objection, and to be procedurally fair to TP1TP2, I formulated a legal issue for the parties to submit on, with the objective that the answer to the legal issue would determine whether D's preliminary objection was allowed or not.

F [16] The legal issue that I posed to the parties was — can third parties, in the first instance suit (here, the sessions court suit), who wish to appeal against the sessions court's judgment, join the plaintiff, who lost in the sessions court suit, to appeal against the sessions court's judgment? In other words, should the third parties have filed separate appeals?

G [17] P submitted her answer to the issue posed. TP1TP2 submitted their answers too. I found both sets of answers to be of little assistance. Both sets of answers did not answer the issue.

[18] But I found D's answer to be of some assistance.

H [19] My starting point was O 16 r 3(3) of the Rules of Court 2012 ('the ROC'). It provides that a third party notice is a writ, and the third party proceeding is itself an action or suit. It also provides that in the third party suit — a defendant who issues the third party notice is a plaintiff, and the third party is a defendant.

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[20] The pertinent part of O 16 r 3(3) is set out here:

16 Third party and similar proceedings

3 Issue, service of and entry of appearance to third party notice (O 16 r 3)

- (1) The order granting leave to issue a third party notice may contain directions as to the period within which the notice is to be issued. A
- (2) There shall be served with every third party notice a copy of the writ or originating summons by which the action was begun and of the pleadings, if any, served in the action. B
- (3) Subject to paragraphs (1) and (2), [and other Rules] ..., rule 3 shall apply in relation to a third party notice and to the proceedings begun thereby as if — B
 - (a) *the third party notice is a writ and the proceedings begun thereby an action;* and C
 - (b) *the defendant issuing the third party notice is a plaintiff and the person against whom it is issued a defendant in that action.* (Emphasis added.) D

[21] Order 16 r 7 of the ROC sheds further light on the issue. It provides that in a suit, which contains a third party suit within it, judgment can be entered for the plaintiff against the defendant. And judgment can be entered for the defendant against the third party: E

7 Judgment between defendant and third party (O 16 r 7) E

- (1) Where in any action a defendant has served a third party notice, *the Court may at or after the trial of the action or, if the action is decided otherwise than by trial, on an application, order such judgment as the nature of the case may require to be entered for the defendant against the third party or for the third party against the defendant.* F
- (2) Where in an action judgment is given against a defendant and judgment is given for the defendant against a third party, execution shall not be issued against the third party without the leave of the Court until the judgment against the defendant has been satisfied. G

[22] I then proceeded to seek guidance from cases which are known as third-party-proceeding authorities, such as: (1) *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226; [1989] 1 CLJ 98 (SC); (2) *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 AMR 1561; [1999] 2 CLJ 151; and (3) *Majlis Bandaraya Petaling Jaya v Digital Viva Sdn Bhd & Anor* [2020] MLJU 88; [2020] 3 CLJ 520 (CA). H

[23] In *United Merchant Finance Berhad*, the Federal Court, through Justice Mohamed Dzaiddin FCJ (later CJ), propounded (at p 662 (MLJ)) that: I

... third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v Medical Superintendent General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC)).

A [24] In *Majlis Bandaraya Petaling Jaya*, the Court of Appeal, through Justice Suraya Othman JCA, enunciated:

B [29] As can be seen from a perusal of O 16 r 3 above, the whole concept of a third party proceedings is that it is an independent proceeding between a defendant as a plaintiff and a third party as a defendant. The defendant takes a third party proceeding against the third party to seek for contribution or indemnity in the event the defendant is found liable and it was not intended to be treated in the same way as an action between a plaintiff and a defendant. The effect is that, *a third party proceedings constitute a separate action between a defendant and a third party within the main action*. This proposition can be found in the case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226, p 228, where the Supreme Court held as follows:

C *We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.*

D *Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant ...*

E [25] The principle that is propounded by these authorities, and applied here to the sessions court suit, was that the third party proceeding was purely between D and TP1TP2. The third party proceeding was a separate and distinct proceeding to determine TP1TP2's indemnity and contribution towards D's liability to P (if any).

F [26] The foundation and structure of the judgment in the suit between P and D was the original dispute between P and D, namely P's suit for negligence against D. But the foundation and structure of the judgment in the suit between D and TP1TP2 was the third party suit between D and TP1TP2, namely on the issue of indemnity or contribution by TP1TP2 towards the liability of D, if liability was found against D.

G [27] Further, the sessions court (the trial court) could render judgment in the suit between P and D, and could separately render judgment in the suit between D and TP1TP2. So, TP1TP2 could appeal against the sessions court's judgment in the suit between D and TP1TP2, but TP1TP2 *could not appeal* against the sessions court's judgment in *the suit between P and D*.

H [28] I was also guided by the case law authority of *Lilies Suraya Abdul Latib v Khairul Sabri* [2020] 4 AMR 365 (HC); [2019] 1 LNS 2099, where Justice I Wong Kian Kheong J (now JCA) held that:

[11] I am of the view that the plaintiffs cannot appeal against SC's decision regarding the second to fourth TP. My reasons are as follows: (1) ... third party proceedings are purely between the defendant and third party; (2) a plaintiff has no claim against a third party. Nor has a third party any counterclaim against a plaintiff.

- Hence, the trial court cannot decide on any matter between a plaintiff and third party; (3) if a trial court cannot decide on any matter between a plaintiff and third party: (a) the plaintiff cannot appeal against a trial court's decision regarding third party proceedings; and (b) the third party cannot file an appeal against any decision of the trial court in respect of the original action between the plaintiff and defendant ...
- [29] For these reasons, my findings on D's preliminary objection were:
- (a) first — procedurally, it was not proper for TP1TP2 to join-up with P to lodge one combined appeal. Their respective causes and suits were separate from each other. The judgment between P and D was appealable by either P or D. Here, P appealed. The judgment between D and TP1TP2, however, was appealable by D or TP1 or TP2; and
 - (b) second — since the sessions court found no liability on the part of D ie no judgment was entered for P against D, there was naturally *no judgment* for D against TP1TP2. *There was no judgment for TP1TP2 to appeal against.*
- [30] And so, I held that TP1TP2's purported appeals, which were conflated with the sole notice of appeal that was lodged, were defective and incompetent. Effectively and procedurally, TP1TP2 had no appeals here.
- [31] I therefore allowed the defendant's preliminary objection against TP1TP2's appeals. In allowing the defendant's preliminary objection against TP1TP2's appeals, the only appeal that remained for me to determine was P's appeal against the sessions court's judgment in the suit between P and D.
- TP1TP2 FILED A NOTICE OF APPEAL (TO THE COURT OF APPEAL) THAT IS INCONSISTENT WITH THE TERMS OF THEIR MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEAL, AND INCONSISTENT WITH THE TERMS OF THE ORDER FOR LEAVE
- [32] At this juncture, I need to point out several incongruities in the proceedings that TP1TP2 have thus far brought from the sessions court to the High Court, and now to the Court of Appeal.
- [33] From the sessions court, TP1TP2 brought to the High Court purported appeals that conflated with P's appeal. It bears repeating that TP1TP2 and P filed one notice of appeal that was intended to capture their three respective appeals.

- A [34] D objected to TP1TP2's appeals. I heard the parties on D's objection and decided that TP1TP2's appeals, filed conflatedly with P's appeal, were defective and incompetent. My decision was that TP1TP2 did not have any appeal before me.
- B [35] As a result, *I did not hear TP1TP2's purported appeals on the merits*. I made no findings on liability or quantum against them.
- C [36] I also did not analyse, as an appellate court would, the sessions court's judgment as against TP1TP2, since there was effectively no judgment for D against TP1TP2 (the sessions court found D not liable to P.)
- D [37] TP1TP2's current appeal from the High Court to the Court of Appeal was premised on, and stemmed from, the order that I made on D's objection against TP1TP2 filing one conflated appeal together with P.
- E [38] As such, if TP1TP2 wanted to appeal against my decision, it must be against my decision on D's objection, which was my decision that their purported appeals from the sessions court were defective and incompetent.
- F [39] However, when I perused TP1TP2's cause papers in their motion for leave to appeal to the Court of Appeal (in Court of Appeal Motion No P-08-437-12 of 2022), it appeared to me that TP1TP2 applied for leave to appeal against the decision that I made against them, purportedly *on liability*. But I did not make such a decision. I did not make a decision on TP1TP2's liability.
- G [40] But TP1TP2's notice of motion in the Court of Appeal prayed for leave to appeal against my purported decision that dismissed their appeals *on the issue of liability* ('merayu terhadap keseluruhan keputusan ... Mahkamah Tinggi ... yang telah menolak Rayuan Pemohon-Pemohon [TP1TP2] *atas isu liabiliti*').
- H [41] And in TP1TP2's affidavit in support of the motion for leave to appeal to the Court of Appeal — which I must point out, was *affirmed* not by either or both of them, but *by their solicitor* — averred to the issue of *liability* in the third party suit between D and TP1TP2. But I did not decide on the issue of liability between D and TP1TP2.
- I [42] It was therefore my opinion that TP1TP2's appeal to the Court of Appeal could not, or should not, be against my *decision on liability*, as I did not make such a decision. My decision, as against TP1TP2, was that their conflated appeal from the sessions court was defective and incompetent (as a result of D's objection against the propriety of TP1PT2's conflated appeal).

[43] In other words, my decision was that TP1TP2's appeal from the sessions court was defective and incompetent. But their motion in the Court of Appeal was for leave to appeal against my decision against them purportedly *on liability*. This was the first incongruity.

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[44] There was a second incongruity. The second incongruity was between the *terms* of the motion for leave (what they prayed for) and the *terms* of the Court of Appeal order that were drawn up and filed by TP1TP2. In their motion for leave to appeal, TP1TP2 prayed for leave to appeal against my decision on liability (which I did not make). But in the *Court of Appeal order* granting TP1TP2 leave to appeal, TP1TP2 were granted leave to appeal against my decision which purportedly dismissed their appeals on liability, *and, additionally, on quantum* as well (*which was in fact not prayed for in their motion for leave*) ('yang telah menolak Rayuan Pemohon-Pemohon [TP1TP2] atas isu liability *dan kuantum*').

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[45] The terms have changed. The width of the leave to appeal was increased. TP1TP2 prayed for leave to appeal against my decision on liability. But the leave order stated that leave was granted to appeal against my decision on liability *and quantum*. This was the second incongruity.

E

[46] Then there was a third incongruity. TP1TP2 filed a notice of appeal — encl 108 in the High Court file — that stated that they now appeal against my decision *on D's preliminary objection against TP1TP2's conflated appeal, and on liability, and on quantum*.

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[47] The terms have changed again. The width of the leave to appeal increased further. TP1TP2 appeared to keep adding to the terms of their leave to appeal. They applied to the Court of Appeal to appeal against my decision against them, purportedly *on liability* (when I did not actually make a decision against them on liability). The Court of Appeal granted them leave to appeal. They drew up and filed a leave order that stated that they had leave to appeal against my decision against them on liability *and quantum*.

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[48] When they eventually filed their notice of appeal, the notice of appeal stated that they now appealed against my decision against them on liability, and against my decision against them on quantum (which was also a decision that I did not make against them), as well as against my decision on D's objection against their conflated appeal.

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[49] It is my opinion that regardless of whether TP1TP2 and their solicitors changed the terms (the scope) of their leave to appeal — inadvertently or intentionally — what they appeared to have done was inappropriate.

A [50] Also, I do not think that TP1TP2 obtained the leave of the Court of Appeal to appeal against my decision on D's objection, which led to my decision that TP1TP2's conflated appeal from the sessions court to the High Court was defective and incompetent.

B [51] In effect, TP1TP2 did not get leave to appeal against the decision that I actually made against TP1TP2.

C [52] In the circumstances, I would like to emphasise that this judgment, as against TP1TP2, contains only my reasons for deciding that TP1TP2's purported appeals from the sessions court to the High Court were defective and incompetent. This judgment does not contain any grounds that relate to dismissing TP1TP2's purported appeals from the sessions court to the High Court *on the merits — neither on liability nor on quantum*.

D THE LAW ON APPELLATE INTERVENTION — THE 'PLAINLY WRONG' TEST

E [53] I then proceeded to opine on P's appeal from the sessions court, on liability and quantum. I considered the issues that arose before the sessions court and the resultant judgment of the sessions court.

F [54] Siting as an Appellate Court, I should only interfere to disturb the findings of the first instance court, here: the sessions court judge ('SCJ'), if the SCJ was 'plainly wrong' in her decision.

G [55] The Federal Court, in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 (FC); [2020] 8 AMR 227; [2020] 10 CLJ 1, through Justice Zabariah Mohd Yusof FCJ, comprehensively expounded the genesis of the 'plainly wrong' principle, through its development, into its current meaning.

H [56] *Ng Hoo Kui* propounded that the primary 'plainly wrong' principle, includes the following elaborative principles:

- I
- (a) the SCJ's decision here would be 'plainly wrong', if it was arrived at through 'no or insufficient judicial appreciation of the evidence': referring to *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785 (FC);
 - (b) this phrase of the 'lack of judicial appreciation of the evidence' encompasses these three errors:

- (i) critical factual finding which has no basis in evidence (findings not based on the evidence); A
 - (ii) demonstrable misunderstanding of the relevant evidence (misunderstanding the evidence);
 - (iii) demonstrable failure to consider the relevant evidence (failure to consider the evidence). B
 - (c) the SCJ's decision would be 'plainly wrong', if it was arrived at through a 'material error of law': following *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 (UKSC); and C
 - (d) the SCJ's decision would be 'plainly wrong', if it 'could not reasonably be explained or justified', making it a decision 'which no reasonable judge could have reached': *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641 (FC). D
- As the Appellate Court, I was to evaluate whether the SCJ's decision was 'reasonably made'.

[57] However, the 'plainly wrong' principle is not intended to be used as a catch-all method to replace the SCJ's decision with my *own* (the Appellate Court's) decision, on the facts of the case. The Federal Court in *Ng Hoo Kui* put it this way: E

[76] What is pertinent is that, the 'plainly wrong' test *is not intended to be used by an Appellate Court as a mean to substitute its own decision for that of the trial court on the facts.* F

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra* an appellate court *should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.* If the decision did not fall within any of the aforesaid category, it is irrelevant, *even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.* G

[58] Put differently — even if an Appellate Court finds, on the evidence and the facts of a case, that it would have come to a different decision, the Appellate Court *should not bypass an analysis of the first instance court's reasoning* when it is deciding on the appeal. H

[59] In other words, I must not make my own findings and substitute the SCJ's judgment with my own judgment. Instead, I must evaluate the SCJ's reasoning and decide if the SCJ's judgment was reasonably arrived at. Or, I

A conversely, decide if the SCJ's judgment was unreasonably arrived at ie the SCJ was 'plainly wrong', which would call for me to interfere.

[60] I therefore consider the SCJ's appreciation of the evidence, and her application of the law, in the context of these elaborative principles, to see if the SCJ's judgment was 'plainly wrong'.

LIABILITY

C *It is P's burden to prove D's negligence*

[61] I found that the SCJ correctly applied the principle of law that in this negligence suit, the burden was on P to prove that D was negligent. Put differently, it was not D's burden to prove that D was not negligent. It was for P to prove that D was negligent.

[62] The SCJ cited the Federal Court case of *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175; [1971] 1 LNS 151 (FC), which enunciated that:

E *In a negligence action the onus of proof rests wholly on the plaintiff*, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence ... (Emphasis added.)

[63] The SCJ also cited the High Court case of *Ng Chul Sia v Maimon bt Ali* [1983] 1 MLJ 110; [1982] 1 LNS 95 (HC), which held (at p 111 (MLJ)) that:

F *...When an accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.* (Emphasis added.)

G *The trial judge should consider which version is inherently probable*

[64] I also found that the SCJ correctly applied the principle that where there were conflicting versions of the facts of a case (here: how the accident happened), the trial judge's approach was to consider which of the two conflicting versions was inherently probable.

[65] The SCJ cited the High Court case of *Noorianti Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242; [1990] 1 CLJ 943 (HC), which propounded (at pp 243–244 (MLJ)) that:

I It is useful to pause here for a moment to say a few words regarding the approach which a trial judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses

of one party was unshaken or unbroken is not per se an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration: see for instance *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at p 247 and *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368 at p 372. It has also been said that *a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable*: see for instance *Koay Teik Choo & Ors v R* [1956] MLJ 52. With these principles in mind I shall now assess the evidence in the present case. (Emphasis added.)

The SCJ found D's version of the facts inherently probable

[66] I reproduce here the sketch plan that was produced and referred to at the trial:

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A

B

C

D

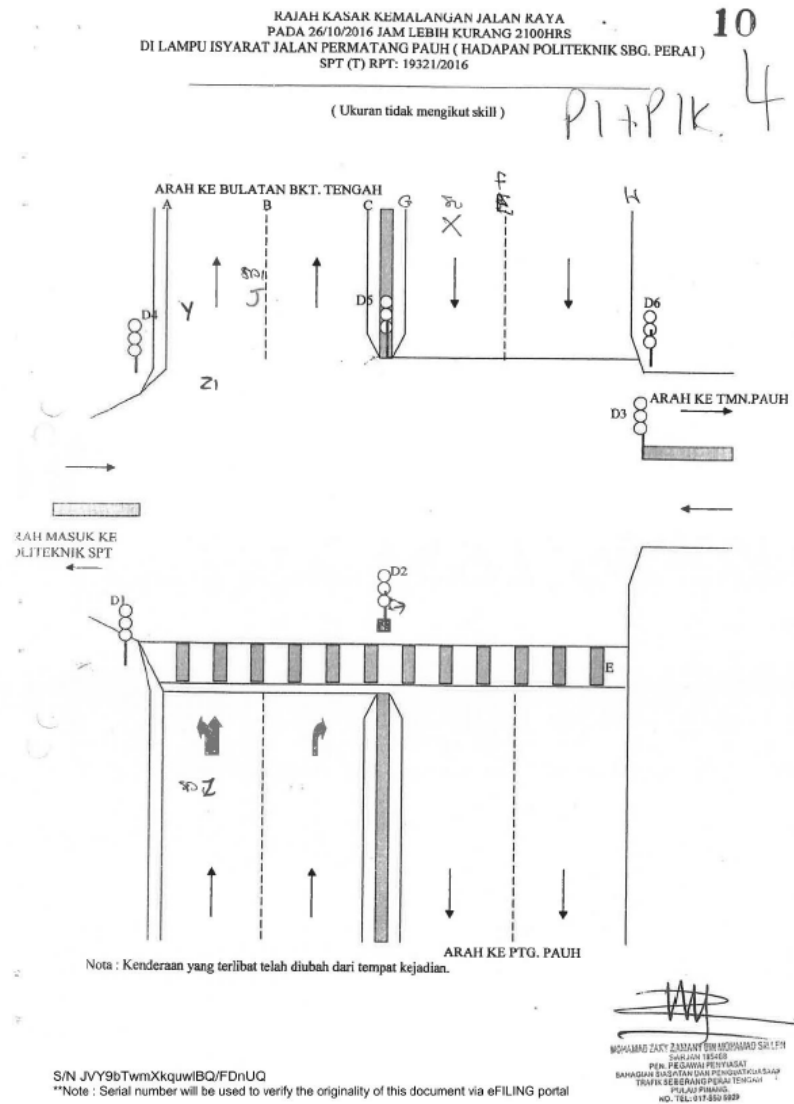
E

F

G

H

I



115

A	-	BAHU JALAN SEBELAH KIRI ARAH KE BULATAN BUKIT TENGAH.
B	-	GARISAN PUTIH PUTUS-PUTUS PEMBAHAGI LORONG.
	-	TEBING BATU PEMBAHAGI JALAN
D1-D6	-	LAMPU ISYARAT.
E	-	LINTASAN PEJALAN KAKI.

A	KE	B	-	3.50	METER
B	KE	C	-	3.50	METER

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H

I

(a) she was riding her father's ('TP2's') motorcycle from point 'X', down towards the traffic lights at 'D5';

- A (b) at the 'D5' traffic lights, when the lights were green, she made a 'turning onto her right-hand side' across to 'lane AB';
- (c) D 'hit the rear side of the motorcycle'; and
- B (d) the 'point of impact' was at 'Y', on the left-side of lane AB, which infers that SP2 had completed the U-turn before she was hit from the rear.

[69] Please note that the words or phrases placed in inverted commas are taken from the SCJ's grounds of judgment.

- C [70] The SCJ found that there were unfavourable facts about SP2 that related to the merits of the suit, which included these findings:
- D (a) SP2 was only 12-years-old at the time of the accident, and she ferried, not one, but two other 12-year-old girls on TP2's motorcycle which was meant to be ridden by an adult. SP2 did not have a licence to ride a motorcycle. The SCJ found that she 'could not be a competent rider', and that she could not have the 'ability to properly appreciate what the traffic signals could mean', so as to observe them and abide by them;
- E (b) The SCJ found that SP2 'had mistook [sic] the traffic-lights signal and miscalculated that there was ample time to make a U-turn'. It was 'evident' to the SCJ that SP2 'was not competent at all to ride a motorcycle', and that 'she had no business to be on the road'. The SCJ found that SP2 'was a trespasser and a danger to other road users';
- F (c) in her police report (made in 2016), SP2 stated that as the traffic lights were green, she straightaway made a U-turn. And suddenly her motorcycle was hit by D's car ('saya dapati lampu isyarat hijau dan terus membuat pusingan 'U', tiba-tiba m/sikal saya telah dilanggar'). In other words, her motorcycle was hit while she was making the U-turn;
- G (d) but at trial (in 2019), SP2 testified that she had 'completed making the U-turn', such that the motorcycle and D's car were travelling in the same direction when the motorcycle was hit directly from the rear. SP2 was attaching blame solely on D;
- H (e) the SCJ found SP2's oral testimony at trial (that both vehicles were going in the same direction and she was hit directly from the rear) to be 'not in line with' her police report narrative that the motorcycle was hit while she was making the U-turn;
- I (f) the SCJ found that SP2's oral testimony at trial 'reversed her stated direction of travel' in 'an attempt to portray the case' as a case of 'rear vehicular collision', rather than a case of SP2 crossing into D's right of way when she was doing the U-turn; and

- (g) also, the SCJ pivotally found that SP2 made an ‘illegal U-turn in the face of oncoming traffic’.

A

[71] A U-turn breaches the Road Traffic Rules 1959. Rule 13(1) is set out below:

B

Section 13 U turns

(1) ... *no driver of any motor vehicle* whilst being driven on any road *shall cause his motor vehicle to be turned in such a manner that it is made to face the opposite direction* unless either:

C

- (a) he shall have first negotiated a round-about; or
- (b) such turn is permissible by virtue of the road sign No 34E, Traffic Signs (Size, Colour and Type) Rules 1959 [LN167/1959].

[72] The SCJ found that SP2 was ‘not a credible witness’, who ‘obviously wanted to shift the blame’ to D.

D

[73] The SCJ found SP2’s evidence to be ‘inconsistent, variable, contradictory and unreasonable’, and ‘not corroborated by the silent evidence’.

E

[74] Further, the SCJ looked unfavourably at the fact that SP2 lodged her police report as late as two months after the accident. The accident happened on 26 October 2016. SP2 lodged her police report on 22 December 2016. The SCJ found that this delay did not assist P’s case.

F

[75] To support her finding, the SCJ cited the Federal Court case of *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119; [1974] 1 LNS 61 (FC), which held (at p 121 (MLJ)) that:

G

... In the familiar case where a police report is admitted under the law, it is necessary that it should have been made before police investigation has commenced. The reason for this is that this class of statement is admitted upon the principle that it is the natural effusion of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. *The main test as to whether there has been a delay in making the report is whether it was made as early as can reasonably be expected in the circumstances of the case and before there is opportunity for tutoring or concoction. This, in my opinion, is also a circumstance tending to affect a witness’s impartiality, hence his veracity which must be taken into account in arriving at a decision ...*

H

I

[76] The SCJ found that this two-month delay to lodge her police report was unsatisfactorily explained because SP2 suffered only minor injuries — ‘abrasion on both arms and dislocated ankles’. The SCJ found that the delay in lodging SP2’s police report ‘affected the accuracy or veracity of the report’.

A *D's version*

[77] In contrast, the SCJ found that D's version included the following facts:

- (a) D lodged her police report within 24 hours of the accident;
- B** (b) in her police report, D stated that as she crossed the main traffic lights junction, the motorcycle from the opposite direction suddenly made a U-turn. D could not avoid colliding with the motorcycle at the rear portion ('tiba-tiba sebuah m/sikal ... datang dari arah hadapan terus membuat pusingan U secara mengejut. Saya tidak sempat mengelak lalu melanggar m/sikal tersebut di bahagian belakang'); and
- C** (c) the point of impact was at 'J', on the right side of lane AB, which infers that the motorcycle had *not yet completed the U-turn* before D's car collided with it.

D

[78] The SCJ found facts that were favourable for D which related to the merits of the suit, which included these findings:

- (a) D was 'forced to take appropriate evasive action by *swerving to her right*', in an endeavour to avoid colliding with the motorcycle; and
- E** (b) D's car hit the motorcycle 'slantwise at the rear'.

F

[79] This finding was supported by the evidence of the damage to the respective vehicles. The Investigating Officer ('IO') testified that for the motorcycle, the damage was 'both to its front and rear portions'. The IO listed the damage to the motorcycle to include — 'lampu belakang pecah', 'nombor plet belakang pecah', 'cover set belakang pecah', 'rim tayar belakang pecah', 'lampu isyarat kiri kanan depan pecah'.

G

[80] As for D's car, the IO listed the damage to include — 'lampu depan besar kiri peach', 'bumper hadapan kiri pecah', 'mudguard depan kiri pecah', and 'bonet depan hadapan kemek'. So the damage to D's car 'was on all its *front left side*'.

H

[81] The damage to D's car, particularly, did not support SP2's version that the two vehicles were moving in the same direction, and D's car hit the motorcycle directly from the rear.

I

[82] Instead, the damage to D's car supported D's version that the motorcycle 'cut across' D's 'right of way', causing D to evasively swerve to the right to avoid colliding with the motorcycle, but the front left side of D's car hit the motorcycle at an angle.

[83] The SCJ found D's version to be 'inherently probable'. Consequently, the SCJ found that P had failed to prove, on the balance of probabilities, that D was negligent.

A

SUMMARY ON LIABILITY

B

[84] I found that in her grounds of judgment, the SCJ evaluated the oral evidence, with particular focus on the two main protagonists in this matter, namely D and the then 12-year-old motorcycle rider: SP2 (who was still only 15 when she testified in 2019). The SCJ evaluated also the documentary evidence: the respective police reports and the sketch plan. The SCJ evaluated the physical evidence, such as the nature and extent of the damage to the motorcycle and D's car.

C

[85] The SCJ was in the position to hear, observe and assess not only the witnesses' demeanour, but also their credibility, and the cogency of their testimonies. The SCJ was able to check the oral evidence against the documentary evidence and the physical evidence.

D

[86] The SCJ's conclusions included:

E

- (a) the D's version was inherently probable;
- (b) D's oral testimony was consistent with her police report, which was lodged within a day after the accident. That version was that as D drove her car through the main intersection, the motorcycle ridden by SP2, made a U-turn from the opposite direction, cut across D's path and caused the collision. D's car hit the motorcycle at an angle. The damage to the car was all on the front *left side*; and
- (c) in contrast, SP2's oral testimony was not consistent with her police report, which was incidentally lodged two months after the accident. In her police report, SP2 stated that her motorcycle was hit while she was making the U-turn. But in her oral testimony at trial, she said that she was hit squarely from the rear; while she was travelling in the same direction as D.

F

G

H

[87] The SCJ found that SP2's evidence was 'inconsistent, variable, contradictory, and unreasonable'.

[88] The SCJ found that D was not negligent. Rather, it was SP2 who caused the accident which resulted in P's injuries.

I

P's arguments

A [89] I now proceed to address P's arguments that were canvassed before me or canvassed before the SCJ — *not* arguments that were *not* canvassed before me or *not* canvassed before the SCJ — since it would be unfair for me to have evaluated the SCJ's judgment on arguments not canvassed before her, and similarly for my judgment here to be evaluated on arguments that were not
B canvassed before me.

[90] P mounted several arguments in this appeal. The first argument worth noting was that P argued that the SCJ delivered three different judgments. The first judgment was purportedly delivered in open court on 29 August 2019.
C The second judgment was purportedly conveyed to D's solicitors after P's solicitors had left the courtroom, also on 29 August 2020. The third judgment was the SCJ's written grounds of judgment.

D [91] I found this argument to be untenable. The only judgment that the SCJ delivered, with reasons stated, was contained in the SCJ's grounds of judgment. I did not see how P could be mistaken or confused as to the terms of the SCJ's judgment. And *that* was the SCJ's judgment that I was to evaluate in this appeal.

E [92] Second, P argued that as D did not state in her police report that the traffic lights were green in her direction, it was fatal to D's case.

F [93] I found this argument meritless as well. P was arguing about what D did not state in her police report. That went to the issue of D's evidence. D was not bound by the statements in her police report, unlike the averments in her pleadings, by which she was bound.

G [94] Further, the content of D's police report was evidence of D's prior statement about the fact of the accident and the facts surrounding the accident. The burden was on D to prove those facts. Just as it was P's burden to prove the facts stated in SP2's police report.

H [95] Third, P argued *on behalf of TP1TP2* that they should not be made liable at all because *they did not know* that their children had gone out riding on TP2's motorcycle. I believed that *that* was the SCJ's very point against TP1TP2 — that they were in dereliction of their duty of care as guardians. The children under their care had taken out TP2's motorcycle. The rider: SP2 rode with not one but two pillion riders, making a U-turn that the IO testified that they
I should not have made.

[96] The SCJ found that in TP1's (P's father's) testimony, TP1 was 'regretful' that P slipped out of the house for the ride on the motorcycle 'without prior permission'.

[97] The SCJ also found that P ‘failed to heed’ TP1’s advice not to take a ride on another person’s motorcycle. The SCJ found that P suffered her injuries ‘partly of her own fault’.

A

[98] In other words, P failed to use reasonable care for her own safety.

B

[99] As for TP2 (SP2’s father), the SCJ found that TP2 had a ‘permissive habit’ of leaving the motorcycle keys at the door, which SP2 could easily take.

[100] In essence, the SCJ found that P failed to satisfy her burden to prove that D was negligent. The SCJ found that it was SP2 who caused the accident. The SCJ found that D was not liable to P.

C

[101] Since the SCJ found that D was not liable to P, it was academic for the SCJ to set out her views about who was responsible for causing the accident. Even though there may have been no need for the SCJ to set out these findings, the SCJ proceeded to apportion liability and give her views about contributory negligence.

D

[102] The SCJ opined that P was 25% ‘liable’ ie 25% contributorily negligent; TP1 was 25% liable ie 25% contributorily negligent; and TP2 was 50% liable ie 50% contributorily negligent. I could comprehend the SCJ’s findings. The SCJ found P and her father (‘TP1’) 50% at fault, and similarly SP2 and her father (‘TP2’) the balance 50% at fault. But since SP2 was not a party to the suit, the SCJ placed the balance 50% wholly on TP2.

E

F

[103] Even though there may have been no need for the SCJ to set out these apportionments of liability, I found that for completeness, these percentages of liability could be useful.

G

[104] This was because the SJC wrote her grounds of judgment for this appeal. This proceeding before me was an appeal proceeding. The SCJ found D completely not liable. But, if I were to disagree with the SCJ’s findings on liability — for example, that D is completely liable, or that D is contributorily negligent — the SCJ would then have set out findings of apportionment of liability or contributory negligence that I could consider, to render a judgment with different percentages as to liability.

H

The SCJ’s findings on the liability of TP1TP2 — does this make the SCJ plainly wrong?

I

[105] In the SCJ’s apportionment of liability, the SCJ found P 25% contributorily negligent, and apportioned 25% liability to TP1 and 50%

A to TP2. Even though this was not in line with the principle that the third party proceeding was a separate suit between D and TP1TP2 (as distinct from the suit between P and D), it was my view that the SCJ's reasoning here did not necessarily make the SCJ 'plainly wrong', or that the SCJ committed a fundamental error in her judgment in P's suit against D.

B
[106] I could understand the SCJ's rationale. The SCJ found D not liable at all. That meant that D was '0% liable' to P. Out of the 100% liability, the SCJ apportioned liability to P, and TP1TP2. The SCJ 'apportioned' liability, even though there was no need for the SCJ to do so. The SCJ apportioned 25% to P, 25% to P's father: TP1, and 50% to SP2's father: TP2.

C
[107] To my mind, *the effect* of the SCJ's finding that P was 25% 'liable', that TP1 was 25% liable, and that TP2 was 50% liable for P's injuries — was that D was not at all liable to P, in P's suit against D. Ultimately, regardless of the terminology used — 'liable' or 'contributorily negligent' or 'fault' — the net result of the SCJ's rationale was that D was not at all liable to P.

D
[108] But I must point out that in P's suit against D, there was no issue of TP1TP2's liability *to P*. In P's suit against D, there should only be the issue of D's liability to P.

E
[109] The issue of TP1TP2's liability to D was in the third party proceedings, which was, as pointed out earlier, the suit between D and TP1TP2.

F
[110] So, the question to consider was — when the SCJ found no liability by D to P, but yet attributed liability and contributory negligence to P and TP1TP2, was the SCJ 'plainly wrong'? In my view, this rationale *does not* make or render the SCJ's judgment (and the grounds of her judgment) — that D was not liable to P — 'plainly wrong'.

G
[111] I found that the SCJ's apportionment of liability in this manner did not make the SCJ 'plainly wrong' in her judgment. The SCJ straightforwardly found D not liable at all to P.

H
[112] The SCJ weighed and evaluated all the surrounding circumstances on how the car collided with the motorcycle at an angle; that the car did not hit the motorcycle directly or squarely at the rear. The car and the motorcycle were both in motion. At the instant that D saw the motorcycle, her reflexes would have sprung into action to move the car, to evade hitting the motorcycle. The pivotal fact was that the car collided with the motorcycle at an angle.

I

[113] I found that the SCJ's appreciation of the evidence and the surrounding factors was fair and balanced. A

[114] I was not prepared to overturn the SCJ's judgment in P's negligence suit against D, on this ground. I did not think that it is just and fair to do so, particularly since I found that the SCJ had appreciated and evaluated the relevant evidence that related to the merits of P's suit against D. B

The terms of the judgment dated 29 August 2019

[115] When I looked at the SCJ's judgment dated 29 August 2019, I found that the SCJ did not hold TP1TP2 liable to D, nor to P. The terms of the judgment stated that: C

- (a) the SCJ dismissed P's suit against D ie the SCJ decided on liability; D
- (b) the SCJ assessed general damages at RM130,400 and special damages at RM82.30 ie the SCJ decided on the quantum of damages; and
- (c) the SCJ awarded costs at RM11,297 ie the SCJ computed the costs.

[116] In effect, the SCJ's judgment was a judgment only in P's suit against D. There was, in fact, no judgment in the third-party suit between D and TP1TP2. The SCJ made no judgment in D's third party suit against TP1TP2. E

QUANTUM F

General damages

[117] I found the SCJ's judgment on quantum to be reasonable. In her grounds of judgment, the SCJ set out a comparison table of: G

- (a) the amount prescribed by the Compendium;
- (b) the amount proposed by P; and
- (c) the amount proposed by D, H

for each of the five 'headings of injury'. The SCJ then decided on an amount against each heading of injury. I found that there was nothing fundamentally flawed or erroneous in this method and in her findings.

[118] I would like to suggest to the parties that the SCJ's grounds of judgment be included in the record of appeal, so that it can be referred to in the current two appeals to the Court of Appeal. This is so that the SCJ's comparison table can be analysed. I

- A** [119] Briefly, under the first heading of injury of ‘Bilateral eyes periorbital haematoma, left eye traumatic mydriasis, chemosis of both eyes’, the compendium prescribed damages for the same or similar injuries at RM10,000–RM20,000. P proposed RM80,000. D proposed RM9,000. The SCJ assessed it at *RM9,000*.
- B**
- C** [120] Under the second heading of injury of ‘Multiple skull bone fractures’, the compendium prescribed damages for the same or similar injuries at RM10,000–RM15,000. P proposed RM35,000. D proposed RM33,000. The SCJ assessed it at *RM33,000*.
- D** [121] Under the third heading of injury of ‘Multiple head injuries’, the compendium prescribed damages for the same or similar injuries, broken down into component injuries, which added up to the aggregate range of RM110,000–RM165,000. P proposed RM250,000. D proposed RM70,000. The SCJ assessed it at *RM70,000* (because P’s head injuries ‘healed well and no medications [are] needed’).
- E** [122] Under the fourth heading of injury of ‘Multiple facial bone fractures/multiple abrasion wounds’, the compendium gave examples of the same or similar injuries in various amounts of damages. P proposed an aggregate of RM93,000. D proposed an aggregate of RM44,000. The SCJ assessed it at *RM44,000* (with a reference to two case law authorities).
- F** [123] Under the fifth heading of injury of ‘Scars’, the compendium prescribed damages for the same or similar injuries in various amounts. P proposed RM10,000. D proposed RM7,000. The SCJ assessed it at *RM7,000* (again with a reference to two case law authorities).
- G** [124] As can be seen, the SCJ accepted D’s proposal and submissions for each heading of injury. The SCJ was not ‘plainly wrong’ for doing that.
- H** [125] The SCJ assessed damages at *RM163,000*. The SCJ then deducted a 20% ‘overlapping’ factor and arrived at a final sum of *RM130,400*.
- I** [126] P argued that the SCJ should not have deducted 20% from the sum of general damages for overlapping. P argued that P’s injuries were all over her body, and for this reason, there should not be any deductions for overlapping at all.
- [127] But P’s injuries were in fact concentrated at the head — the eyes, the skull bone fractures, the head injuries, the facial bone fractures and wounds. The SCJ was not ‘plainly wrong’ to have deducted 20% for overlapping.

[128] P further argues that the SCJ did not follow the current trend for damages for the injuries concerned. But P did not demonstrate how or in what manner the SCJ's assessment of general damages completely or substantially departed from the current trend. It remained an unsubstantiated argument.

A

[129] In summary, as I found that the SCJ's assessment of general damages was reasonable, I did not disturb the SCJ's exercise of her discretion over damages.

B

Special damages

C

[130] Another point of contention was special damages. The SCJ awarded the sum of RM82.30 as special damages. P argued that the parties had earlier agreed to the sum of RM619.80 as special damages, and so the SCJ had committed a fundamental error.

D

[131] I found P's argument untenable. First, again in her grounds of judgment, the SCJ set out a table of special damages and costs. For special damages, out of 16 items of special damages and costs, the *only item* of special damages that was recorded by the SCJ as 'Agreed' was the sum of RM82.30, not RM619.80 (as alleged by P).

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[132] Second, at the hearing of the appeal, P did not show me where in the notes of evidence or the notes of proceedings that the parties had agreed to the sum of RM619.80 and informed the SCJ to record this allegedly agreed sum of special damages.

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CONCLUSION

[133] Applying the elaborative principles for appellate intervention to this appeal, I did not find that the SCJ's analysis of the evidence, and her conclusion on the evidence, to be 'plainly wrong'; or fundamentally erroneous; or that the SCJ did not sufficiently appreciate the evidence; or that the SCJ made a material error of law; or that the SCJ's decision was not reasonably made.

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[134] Rather, I found that the SCJ's evaluation of the evidence to be sound and reasonable.

[135] And so, I did not disturb or interfere with the SCJ's judgment, that D was not liable to P for negligence.

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A [136] For these reasons, I allowed D’s objection and dismissed TP1TP2’s conflated appeal with costs of RM5K each to be paid by TP1TP2 to D, and I dismissed P’s appeal with costs of RM5K to be paid by P to D. Costs are subject to the allocatur.

B *Appeal dismissed.*

Reported by Nabilah Syahida Abdullah Salleh

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